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Supreme Court of the United States

VINCENT F. STRAWBRIDGE, JR.;
REBECCA S. STRAWBRIDGE,

Petitioners,

v.

SUGAR MOUNTAIN RESORT, INC.;
B. DALE STANCIL,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, under fundamental due process principles summarized and established by this Court in *Smith v. Phillips*, the trial court has a duty to hold an inquiry or hearing when a party at trial questions jurors' impartiality.

PARTIES TO THE PROCEEDINGS

Petitioners are Vincent F. Strawbridge, Jr. and Rebecca S. Strawbridge.

Respondents are Sugar Mountain Resort, Inc., and B. Dale Stancil.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Vincent F. Strawbridge, Jr. and Rebecca S. Strawbridge respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The unpublished opinion of the Court of Appeals is reported as *Strawbridge v. Sugar Mountain Resort, Inc.*, 152 Fed. Appx. 286 (4th Cir. 2005) (unpublished; not selected for publication in the Federal Reporter). It is reproduced in the Appendix at App. 1a. The District Court's judgment and opinion denying petitioners' motion for new trial are both unreported and are reproduced in the Appendix at App. 11a, and App. 14a, respectively.

JURISDICTION

The court of appeals judgment was entered on October 28, 2005. A timely petition for rehearing was denied on December 20, 2005. Appendix at 20a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Seventh Amendment to the United States Constitution provides that: "In suits at common law,...the right of trial by jury shall be preserved...."

STATEMENT

Petitioners seek review of the ruling of the Fourth Circuit Court of Appeals which held that federal trial courts do not have to provide an opportunity to prove

actual bias when a juror's partiality is questioned, contrary to this Court's requirement as enunciated in *Smith v. Phillips*, 455 U.S. 209, 215 (1982).

Petitioners seek review of the Fourth Circuit's ruling because it is in conflict with the rulings of this Court in *Smith v. Phillips*, 455 U.S. 209 (1982), *Dennis v. United States*, 339 U.S. 162 (1950), and others. It is also in conflict with the rulings of several other circuits, and this unpublished opinion does not conform with the Fourth Circuit's own requirements when a juror's partiality is questioned. *See United States v. Rucker*, 557 F.2d 1046 (4th Cir. 1977); *United States v. Bynum*, 634 F.2d 768 (4th Cir. 1980); *Jones v. Cooper*, 311 F.3d 306 (4th Cir. 2002).

The petition arises out of a personal injury action brought by Vincent Strawbridge and his wife, Rebecca Strawbridge, following an injury Mr. Strawbridge suffered while skiing at Sugar Mountain Resort, Inc. ("SMR") in North Carolina on January 22, 1998. He suffered a spinal cord injury which rendered him a quadriplegic and made him unable to work to support Mrs. Strawbridge and 10 children. Mr. Strawbridge had skied over a ledge at SMR's resort, where he hit an unmarked bare spot of dirt, and fell. B. Dale Stancil ("Stancil") was named as a defendant on the theory that SMR was his alter ego. Stancil's presence as a defendant was of moment because SMR carried only $1 million in liability insurance.

The district court denied SMR's and Stancil's motion for summary judgment on the issues of negligence and alter ego, but granted the motion on the Strawbridges' request for punitive damages. During jury selection beginning July 12, 2004, the judge asked the panel whether any of the jurors knew of any biases that would affect them, and there was no affirmative response.

Later, the Strawbridges' lawyer asked them whether they knew anybody who was even remotely connected with the ski industry, and again there was no response. After plaintiffs passed the jury, defense counsel asked whether any of the jurors knew anyone closely connected with the ski industry. At this time, juror Nicholson, who had been on the panel when plaintiffs' counsel asked the above question, responded that the president of the company for which he worked was a volunteer ski patroller who might have worked for SMR, the defendant. Plaintiffs' case was based on ski patroller negligence in failing to post warnings of hazardous ski conditions. Another juror, McDonald, reported that the son of one of her best friends owned a local ski shop.

When defense counsel passed the jury, the Strawbridges immediately requested that voir dire be reopened to allow them to inquire of jurors Nicholson and McDonald. This request was denied. At the close of the evidence, the Strawbridges moved to strike jurors Nicholson and McDonald, and this motion was denied. The jury returned a verdict for the defendants on the seventh day of trial. Juror Nicholson was the foreman. A motion for new trial again questioning jurors Nicholson's and McDonald's impartiality was denied without hearing.

The Strawbridges appealed the judgment and denial of motion for new trial of the Western District of North Carolina to the Fourth Circuit Court of Appeals. There, a three-judge panel of the Fourth Circuit requested oral argument, but affirmed the trial court in an unpublished opinion. The Fourth Circuit subsequently denied a petition for rehearing *en banc* filed by petitioners.

REASONS FOR GRANTING OF THE PETITION

A. The Court of Appeals' Decision Undermines this Court's Decision in *Smith v. Phillips* and Others.

The court of appeals decision has decided the issue of a party's fundamental right to an impartial jury in a way that conflicts with relevant decisions of this Court. Although unpublished, its decision is so repugnant to controlling rules and decisions of the Supreme Court that a grant of certiorari is warranted.

The decision of the Fourth Circuit in this case provided an erroneous answer to the question of whether a litigant is entitled to reopen voir dire or have the court make further inquiry when a suspicion of juror bias arises. The Fourth Circuit's unpublished opinion conflicts with its own published opinions, and with the published opinions of at least five other circuits which have held that it is reversible error for the trial court to fail to explore a juror's potential bias once the juror's potential for bias is made known to the court.

In *Smith v. Phillips*, 455 U.S. 209, 215 (1982), this Court, after reviewing other Supreme Court decisions dealing with this subject, recognized that due process requires a hearing or other inquiry when a party raises suspicions about a juror's ability to be impartial:

> Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences when they happen. Such determinations may properly be made at a hearing like that ordered in Remmer and held in this case.

Smith v. Phillips, 455 U.S. at 217. Justice Rehnquist began his review of other Supreme Court decisions standing for this principle by stating, "This court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." *Id.*, at 215. *See also Remmer v. United States*, 347 U.S. 227, 229 (1954); *Dennis v. United States*, 339 U.S. 162, 171-172 (1950); *Chandler v. Florida*, 449 U.S. 560, 575 (1981). As this Court explained in *Dennis*, 339 U.S. at 171-172, "preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury."

The Fourth Circuit's primary error was its holding that the Strawbridges had made no showing that the questioned jurors were biased and that the trial court "did not abuse its discretion in declining to hold a hearing or permit further questioning on the issue of actual bias." *Slip Opinion*, Appendix at 9a-10a. But the Fourth Circuit, in so holding, ignored its own previous opinion that the trial court's "broad discretion in overseeing the conduct of voir dire," is limited by "the essential demands of fairness" (citing this Court in *Aldridge v. United States*, 283 U.S. 308 (1931)) after notice of possible bias of particular jurors is given the court. *United States v. Rucker*, 557 F.2d 1046, 1049 (4th Cir. 1977). According to the Fourth Circuit, itself, once a venireman's answers to voir dire questions indicates "at least an ambiguity" regarding his fitness to sit as a venireman, the matter must be "inquired into in greater depth" by the court. *Id.*, at 1047-48.

Limits on the trial court's discretion in conducting jury voir dire when questions about jurors' impartiality are raised have been in place since *United States v. Burr*, 25 F.Cas. 49 (1807), wherein Chief Justice John Marshall addressed the ways in which the law strives to ensure an impartial jury: "The end to be obtained is an impartial

jury; to secure this end, a man is prohibited from serving on it whose connection with the party is such as to induce a *suspicion* of partiality." (Emphasis added.) 25 F.Cas., at 50. The juror in question in the Strawbridges' case stated that he worked for a man who was a volunteer ski patroller who might have worked at the defendants' resort. Ski patroller negligence was the basis of the Strawbridges' complaint.

This Court's decisions squarely hold that a litigant must be given the opportunity to prove actual bias when suspicions of juror partiality are raised during, or even after, trial, and that failure to do so is reversible error. In *Smith*, this Court determined that no new trial should be awarded because the required hearing had been held. *Id.*, at 217. In *Remmer v. United States*, this Court instructed the trial judge to "determine the circumstances, the impact thereof upon the juror, and whether or not [they were] prejudicial, in a hearing with all interested parties permitted to participate." 347 U.S. 227, at 230. In other words, this Court ordered precisely the remedy which was not accorded by the trial court or the Fourth Circuit in the Strawbridges' case.

In *Dennis v. United States*, *supra.*, this Court rejected the defendant's claim of implied bias, noting that Dennis was "free to show the existence of actual bias" but had failed to do so. 339 U.S., 167. The Court concluded: "A holding of implied bias to disqualify jurors because of their relationship with the government is no longer permissible.... Preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury." *Id.*, at 171-172.

Chandler v. Florida, *supra.*, also treated a claim of implied juror bias, allegedly engendered by unusual publicity and a sensational courtroom atmosphere created by televising the proceedings. Consistent with

this Court's previous decisions, the *Chandler* court held that "the appropriate safeguard against such prejudice is the defendant's right to demonstrate that the media's coverage of his case – be it printed or broadcast – compromised the ability of the particular jury that heard the case to adjudicate fairly." 449 U.S. 560, at 575.

B. The Decision in the Court Below Creates a Split Between the Circuits, Violates the Principle of *Stare Decisis* within the Fourth Circuit, and Departs from the Accepted and Usual Course of Judicial Proceedings.

The Fourth Circuit's decision creates a direct conflict with the decisions of at least five other circuits that follow *Smith v. Phillips* in requiring a hearing when suspicions of juror partiality are raised. In *Caterpillar, Inc. v. Sturman Industries, Inc.*, 387 F.3d 1358 (Fed. Cir. 2004), *cert. denied*, 125 S. Ct. 2906 (2005), a civil case, the court held that a potential juror who was the spouse of a company employee was impliedly biased as a matter of law and should have been dismissed for cause. The court observed that, "[t]ypically, the redress for an assertion of jury bias at the trial court is a hearing at which the defendant is afforded the opportunity to prove actual bias." *Id.*, at 1366, citing *Smith v. Phillips*. *Fietzer v. Ford Motor Co.*, 622 F.2d 281 (7th Cir. 1980), another civil case, found that, "Ford's right to an impartial jury guaranteed by the Sixth Amendment was impaired by the district court's failure to sufficiently probe the jury." *Id.*, at 286. In *United States v. Gillis*, 942 F.2d 707 (10th Cir. 1991), the court held that the trial court had failed to conduct an adequate examination "to negate the risk of prejudice" and that a new trial was required. *Id.*, at 709-711.

Indeed, actual bias cannot be found unless the juror "is adequately questioned," and only after the

proper questions have been asked, does the court have broad discretion in its rulings on challenges. *United States v. Torres*, 128 F.3d 38, 44 (2d Cir. 1997). In the Strawbridge case, at the very beginning after counsel requested to reopen voir dire, the court concluded without further questioning or hearing that, "I'm satisfied that had there been some bias or prejudice that would affect their verdict that it would have been uncovered, and I feel that they will give both sides a fair and impartial trial...." At the end of all the evidence, after plaintiffs made a written motion to excuse jurors Nicholson and McDonald as alternate jurors, the court said, "I've ruled on those and don't expect to change," again without further questioning or hearing. This Court should exercise its supervisory power to correct the Fourth Circuit's departure from the accepted and usual course of judicial proceedings.

The Fourth Circuit's decision in this case conflicts with its own prior decisions and violates principles of *stare decisis*. In 2002, the Fourth Circuit decided that, "a *showing* that a juror was actually biased, regardless of whether the juror was truthful or deceitful, can also entitle a defendant to a new trial." (Emphasis added.) *Jones v. Cooper*, 311 F.3d 306, 310 (4th Cir. 2002). In *United States v. Rucker*, 557 F.2d 1046 (4th Cir. 1977), the Fourth Circuit zealously asserted a party's right, or the court's obligation, to make probing inquiry of jurors after notice of possible bias arises. There, at trial defense counsel had requested an opportunity to ask two jurors to explain certain answers during voir dire, and the court had denied the request. The court held that a defendant is entitled to have sufficient information brought out on voir dire to enable him to exercise his challenges in a reasonably intelligent manner, lest the right to an impartial jury "become an empty ritual." The court said, "if probing questions are never asked after notice of probable disability of particular jurors, salient

information about prospective jurors might never be revealed, and the entire process would do nothing to advance the cause of selecting a competent, disinterested jury." *Id.*, at 1040. The court said that once a venireman's answer indicates "at least an ambiguity" regarding his fitness to sit as a venireman, the matter must be "inquired into in greater depth" by the court. *Id.*, at 1047-48. Lest there should be some question whether the *Rucker* panel's decision set precedent in the Fourth Circuit, it should be noted that the *Rucker* panel decided to follow an earlier Fourth Circuit decision, *United States v. Cavanaugh*, 535 F.2d 1251 (1976), "so far as it may hold that no followup questions are required after the court is put on notice of probable disqualification of a venireman." *Id.*, at 1049. The *Rucker* decision has never been modified or overruled, except by the Strawbridge opinion.

After first deciding that the Strawbridges' appeal merited oral argument under the standards of its internal rules, the Fourth Circuit's panel issued an "unpublished" decision which is "not binding precedent in this circuit" under its local rule. In so doing, the panel granted unto itself license to ignore precedent set by the U.S. Supreme Court, the Fourth Circuit, itself, and other U.S. courts of appeals, on the fundamental due process right to a hearing conducted by the trial judge to determine whether jurors are biased after allegations of juror bias are properly brought to the court's attention. Under the Fourth Circuit's local rules, counsel for plaintiffs and defendants requested that the Fourth Circuit change its unpublished decision to a published decision. The court denied the request. But the decision to make the opinion "unpublished" does not avoid the potential this opinion would have to cause confusion concerning the law not only in the Fourth Circuit, but the other circuits. This unpublished opinion contravenes the Fourth Circuit's rule that one panel cannot overrule or modify a published

opinion of another panel. *See, e.g., Norfolk & Western Ry. v. Director, OWCP*, 5 F.3d 777, 779 (4th Cir. 1993). The Fourth Circuit has departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by the lower court, as to call of an exercise of this Court's supervisory power. For this and the above reasons, this Court should exercise its discretion to grant certiorari.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 04-2250

VINCENT F. STRAWBRIDGE, JR.;
REBECCA S. STRAWBRIDGE,

Plaintiffs - Appellants,

versus

SUGAR MOUNTAIN RESORT, INCORPORATED;
B. DALESTANCIL, individually;
THE SUGAR MOUNTAINIRREVOCABLE TRUST;
THE B. DALE STANCILIRREVOCABLE TRUST,

Defendants - Appellees.

No. 04-2331

VINCENT F. STRAWBRIDGE, JR.;
REBECCA S. STRAWBRIDGE,

Plaintiffs - Appellees,

versus

SUGAR MOUNTAIN RESORT, INCORPORATED;
B. DALESTANCIL, individually;
THE SUGAR MOUNTAINIRREVOCABLE TRUST;
THE B. DALE STANCILIRREVOCABLE TRUST,

Defendants - Appellants.

Appeals from the United States District Court for the Western District of North Carolina, at Asheville. Lacy H. Thornburg, District Judge. (CA-02-92)

Argued: September 19, 2005 Decided: October 28, 2005

Before WILLIAMS and MICHAEL, Circuit Judges, and James C. DEVER, III, United States District Judge for the Eastern District of North Carolina, sitting by designation.

Affirmed by unpublished per curiam opinion.

ARGUED: R. Hayes Hofler, III, HAYES HOFLER & ASSOCIATES, P.A., Durham, North Carolina, for Appellants/Cross-Appellees. Wyatt Shorter Stevens, ROBERTS & STEVENS, P.A., Asheville, North Carolina; James Robert Fox, BELL, DAVIS & PITT, P.A., Winston-Salem, North Carolina, for Appellees/Cross-Appellants. **ON BRIEF:** Daniel B. Hill, HAYES HOFLER & ASSOCIATES, P.A., Durham, North Carolina, for Appellants/Cross-Appellees. Jennifer I. Oakes, BELL, DAVIS & PITT, P.A., Winston-Salem, North Carolina, for Appellees/Cross-Appellants B. Dale Stancil, The Sugar Mountain Irrevocable Trust, The B. Dale Stancil Irrevocable Trust.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

This is an appeal from a defense verdict in a case brought by Vincent and Rebecca Strawbridge against Sugar Mountain Resort, Inc. (SMR), its alleged alter-ego, B. Dale Stancil, and two trusts created by Stancil. (We will refer to the defendants as SMR and Stancil.) Mr. Strawbridge was injured in a skiing accident at the SMR resort. The Strawbridges contend that the district court erred in refusing to allow them additional voir dire or grant a new trial after the defense's voir dire allegedly revealed that two jurors had failed to respond to an important question posed by the Strawbridges during their voir dire. The Strawbridges also claim that the district court erred in excluding evidence about rocks at the site of Mr. Strawbridge's accident. Alternatively, the Strawbridges argue that the district court abused its discretion in refusing to enforce a settlement agreement allegedly reached before trial. Finding no error, we affirm.

I.

The Strawbridges allege that on January 22, 1998, Mr. Strawbridge skied over a ledge at SMR's resort, where he hit a bare spot of dirt, lost control, and fell. Mr. Strawbridge sustained serious physical injuries. In their complaint, filed April 22, 2002, the Strawbridges asserted claims of negligence and loss of consortium and sought both compensatory and punitive damages. Stancil was named as a defendant on the theory that SMR was his alter ego. Stancil's presence as a defendant was of moment because SMR carried only $1 million in liability insurance.

SMR and Stancil filed motions for summary judgment on December 1, 2003, and the motions were referred to the magistrate judge. The magistrate judge held a hearing on these motions on February 4, 2004, and

two days later, on February 6, filed a memorandum recommending the award of summary judgment to the defendants on all claims. After considering the magistrate judge's recommendation de novo, the district judge granted summary judgment to SMR on the Strawbridges' request for punitive damages, but otherwise denied the summary judgment motions. Strawbridge v. Sugar Mountain Resort, 320 F. Supp. 2d 425 (W.D.N.C. 2004).

In the meantime the parties had been involved in settlement negotiations. Prior to the February 4, 2004, summary judgment hearing, the Strawbridges demanded $8 million to settle their claims. Wyatt Stevens, the lawyer for SMR's insurer, made a $450,000 counteroffer, which the Strawbridges rejected. Shortly after the February 4 hearing, a lawyer retained directly by SMR, Robert Riddle, asked the Strawbridges to reconsider settlement.

The parties dispute the facts concerning subsequent settlement negotiations. According to the Strawbridges' lawyer, Hayes Hofler, at approximately 11:00 a.m. on February 6, 2004, Riddle made an offer to settle for the policy limits of $1 million, and Hofler accepted on behalf of the Strawbridges. The Strawbridges allege that, after accepting, Hofler asked Riddle if the payment could be structured as loss of future income in an effort to avoid a $400,000 lien arising from Mr. Strawbridge's medical bills. The Strawbridges claim that Riddle responded that he thought that approach would not be a problem and that he would discuss it with Stevens. SMR disputes this account. It claims that Hofler indicated that his clients (the Strawbridges) would accept the policy limits of $1 million on the condition that payment be structured as loss of future income. SMR insists that because it never accepted this condition, the parties never reached a settlement agreement.

In any event, later in the day of February 6, before Stevens responded to Riddle about payment structuring, Stevens learned that the magistrate judge recommended dismissal of the case. Shortly thereafter, Stevens contacted Riddle and told him that a $1 million settlement, with the structuring condition, was unacceptable. Around 5:00 p.m. Hofler (on behalf of the Strawbridges) left a telephone message for Stevens in an effort to confirm settlement. Stevens returned Hofler's call around 5:30 and told him that Riddle did not have authority to settle the case in light of the Strawbridges' request to structure payment.

In March 2004 the Strawbridges, claiming that a settlement agreement had been reached, filed a motion to enforce it, and the district court held a hearing. After considering the lawyers' oral representations, their affidavits, and transcripts of some of the telephone calls at issue, the court found that no settlement had been reached because the parties never agreed to all material terms of settlement.

The case proceeded to trial on July 12, 2004. During voir dire the judge asked the jury panel some preliminary questions related to possible bias, including: "Do [any] of you have any prejudices or biases that you know of that would affect your ability to sit in a case of this kind involving a ski incident, just simply by the reason of the nature of the sport or exercise, whatever you wish to call it?" J.A. 1131. There was no affirmative response. Later, the Strawbridges' lawyer asked the panel:

> Do any of you have anybody, family, close family, relatives, children, who is in any way involved in the ski industry, not necessarily on the slopes themselves, but

> maybe providing supplies to a resort or making deliveries to a resort or going there to make repairs, that kind of thing, in any way that might be remotely connected with the ski industry?

J.A. 1144. There was no response. The Strawbridges passed on the panel, and the defense side began its questioning. Defense counsel asked whether any of the jurors knew anyone closely connected with the ski industry. Juror Nicholson responded that the president of the company for which he worked was a volunteer ski patroller who might have worked for SMR. Juror McDonald reported that the son of one of her best friends owns a local ski shop. When defense counsel passed on the panel, the Strawbridges requested that voir dire be reopened to allow them to inquire of jurors Nicholson and McDonald. This request was denied. At the close of evidence the Strawbridges moved to strike jurors Nicholson and McDonald, and this motion was denied. The jury returned a verdict for the defendants on the seventh day of trial, and the district court later denied the Strawbridges' motion for a new trial that was based on the claim of inadequate voir dire and juror bias.

The Strawbridges appeal the adverse rulings discussed above. SMR cross-appeals the district court's refusal to give a jury instruction on assumption of risk, and Stancil cross-appeals the court's denial of his motion for summary judgment on the alterego issue.

II.

A.

The Strawbridges contend that the district court erred in refusing to reopen voir dire. They insist that the failure of the two jurors (Nicholson and McDonald) to provide pertinent information in response to their question about ties to the ski industry prevented them from intelligently exercising their peremptory challenges. We conclude that the district court did not err in refusing to reopen voir dire. A trial judge has broad discretion in overseeing the conduct of voir dire, subject to "essential demands of fairness." Aldridge v. United States, 283 U.S. 308, 310 (1931); United States v. Rucker, 557 F.2d 1046, 1049 (4th Cir. 1977). Trial judges "must reach conclusions as to [a prospective juror's] impartiality and credibility by relying on their own evaluations of demeanor evidence and of responses to questions." Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981). An "appellate court [cannot] easily second-guess the conclusions of [a trial judge] who heard and observed" a juror's responses and demeanor during voir dire. Id.

In the present case, the trial judge asked his own preliminary questions on voir dire that were aimed at uncovering any bias or prejudice relating to the sport of skiing. There was no response that raised a red flag. In addition, the judge observed the responses and demeanor of the two jurors in question. The judge declined to reopen voir dire, reasoning that both sides had been given adequate opportunity to question jurors, and all jurors seated assured the judge that they could be fair and impartial. The judge was satisfied that "had there been some bias or prejudice that would affect [the jurors'] verdict . . . it would have been uncovered" during voir dire. J.A. 1194. The trial judge thus determined that the voir dire was adequate on matters of potential bias. We have ample grounds for deferring to this determination,

and we conclude that the judge did not err in refusing to reopen voir dire.

B.

The Strawbridges also contend that they are entitled to a new trial because the two jurors (Nicholson and McDonald) failed to provide honest responses at voir dire. A new trial is warranted when (1) a juror failed to answer a material question honestly on voir dire, even if the failure was innocent, and (2) a correct response would have provided a basis for a challenge for cause. McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 556 (1984). The question the Strawbridges posed to the panel was:

> Do any of you have anybody, family, close family, relatives, children, who is in any way involved in the ski industry, not necessarily on the slopes themselves, but maybe providing supplies to a resort or making deliveries to a resort or going there to make repairs, that kind of thing, in any way that might be remotely connected with the ski industry?

J.A. 1144. The Strawbridges maintain that because the question contained the word "anybody," the two jurors were dishonest when they did not respond with information about non-familial ties to the ski industry.

A new trial is not warranted because, as the district judge found, the jurors did not respond dishonestly to the Strawbridges' question. According to the trial judge, the most logical interpretation of the question is that it was limited to potential jurors' family ties to the ski industry. This interpretation led the judge to conclude that the jurors' responses were neither inconsistent nor dishonest. We agree with the judge's

analysis. The Strawbridges' inability to obtain the information they sought during voir dire is attributable to their failure to state their question clearly, not the jurors' failure to answer the question honestly.

C.

The Strawbridges further argue that they are entitled to a new trial based on the actual bias of jurors Nicholson and McDonald or the trial court's error in denying a hearing (including further questioning) on the issue of actual bias. A showing that a juror was actually biased, regardless of whether the juror was truthful or deceitful, can entitle a party to a new trial. Jones v. Cooper, 311 F.3d 306, 310 (4th Cir. 2002). A trial court has broad discretion to determine whether to order a hearing on a claim of juror bias. See McDonough, 464 U.S. at 556 (Blackmun, J., concurring); Fitzgerald v. Greene, 150 F.3d 357, 363 (4th Cir. 1998).

The Strawbridges have simply made no showing that either Nicholson or McDonald was a biased juror. Moreover, we have reviewed the record and conclude that the trial court did not abuse its discretion in declining to hold a hearing or permit further questioning on the issue of actual bias.

III.

The Strawbridges argue that the trial court erroneously excluded evidence showing that rocks existed on the area of the slope where Mr. Strawbridge fell. Because Mr. Strawbridge testified that he encountered a bare spot of dirt (he did not mention rocks), the court did not err in excluding evidence of rocks on the basis that it was not relevant under Federal Rules of Evidence 401 and 402.

IV.

The Strawbridges argue that the district court abused its discretion in refusing to enforce a settlement agreement they allegedly reached with SMR. A court should enforce a settlement agreement when the partes have agreed on all material terms. Piver v. Pender County Bd. of Educ., 835 F.2d 1076, 1083 (4th Cir. 1987); Boyce v. McMahan, 208 S.E.2d 692, 695 (N.C. 1974). After holding a hearing on the settlement question and carefully reviewing the facts, the district court found that there was no meeting of the minds. Riddle, SMR's lawyer, considered the deal to be conditioned upon the Strawbridges' requirement that payment be structured as loss of future income. The Strawbridges argue that the court should enforce the agreement because payment structure was not a material condition. However, as the district court found, payment structure was material because the defense side feared exposure to liability on Mr. Strawbridge's medical liens. The district court did not abuse its discretion in refusing to enforce the alleged settlement agreement.

V.

Because our rulings on the voir dire, jury bias, evidentiary, and settlement issues mean that the jury's finding of no liability on the part of the defendants will stand, we have no reason to reach the Strawbridges' argument that the district court erred in granting summary judgment to SMR on the issue of punitive damages. Likewise, because the judgment for the defendants will be affirmed, we will not consider the issues raised in the defendants' cross-appeals. The judgment is affirmed.

AFFIRMED

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION

FILED
ASHEVILLE, N.C.
2004 JUL 27 PM 2:09
U.S. DISTRICT COURT
W. DIST. OF N.C.

CIVIL ACTION, FILE NO. 1: 02 CV 92-T

VINCENT F. STRAWBRIDGE, JR., and REBECCA S. STRAWBRIDGE, Plaintiffs,	)	**CORRECTED JUDGMENT**
-vs-	)	
SUGAR MOUNTAIN RESORT, INC., and B. DALE STANCIL, INDIVIDUALLY, Defendants.	)	

THIS CAUSE, coming on for hearing before the Honorable Lacy H. Thornburg, United States District Court Judge for the Western District of North Carolina, and a jury at the July 12, 2004, Term and upon selection and empanelling of a jury, presentation of evidence, argument and charge of the Court, the issues were submitted to and answered by the jury as follows:

1. Was the Plaintiff Vincent Strawbridge, Jr, injured by the negligence of the Defendant, Sugar Mountain Resort, Inc.?

ANSWER: _____ YES __X__ NO

If you answered this Issue, "No," then your deliberations are complete. Sign and date this issue sheet and return to the courtroom. If you answered Issue No. 1, "Yes," then proceed to consider Issue No. 2.

2. Did the Plaintiff, Vincent Strawbridge, Jr., by his own negligence, contribute to his injury?

YES: _____ NO: _____

If you answered Issue No. 1, "Yes," and Issue No. 2 "Yes," then your deliberations are complete. Sign and date this issue sheet and return to the courtroom. If you answered Issue No. 1, "Yes," and Issue No. 2, "No," then proceed to consider the remaining issues.

3. What amount, if any, is the Plaintiff Vincent Strawbridge, Jr., entitled to recover as damages for personal injury?

$_____

4. Did the negligence of Sugar Mountain proximately cause Rebecca S. Strawbridge to lose the consortium of her spouse?

YES: _____ NO: _____

If you answered Issue No. 4 "No," then your deliberations are complete. Sign and date this issue sheet and return to the courtroom. If you answered Issue No. 4, "Yes," then proceed to consider Issue No. 5.

5. What amount, if any, is Rebecca S. Strawbridge entitled to recover for loss of consortium?

$_____

UPON THE RETURN OF THE VERDICT, IT IS NOW, THEREFORE ORDERED, ADJUDGED AND DECREED THAT THE PLAINTIFFS, VINCENT F. STRAWBRIDGE, JR., and REBECCA S. STRAWBRIDGE, HAVE AND RECOVER NOTHING OF THE DEFENDANT, SUGAR MOUNTAIN RESORT, INC., AND THAT THE PLAINTIFFS' ACTION BE, AND THE SAME IS HEREBY, DISMISSED WITH PREJUDICE.

IT IS FURTHERED ORDERED, ADJUDGED, AND DECREED THAT THE COSTS OF THIS ACTION BE, AND THE SAME ARE HEREBY, TAXED AGAINST THE PLAINTIFFS.

PLAINTIFFS' CLAIMS AGAINST THE INDIVIDUAL DEFENDANT B. DALE STANCIL ARE BASED ON ALLEGATIONS THAT DEFENDANT SUGAR MOUNTAIN RESORT, INC., WAS ALTER EGO OF DEFENDANT B. DALE STANCIL, SUCH THAT ANY NEGLIGENCE LIABILITY OF SUGAR MOUNTAIN RESORT, INC., SHOULD BE EXTENDED TO B DALE STANCIL. THE THEORY OF LIABILITY AGAINST B. DALE STANCIL BEING DERIVATIVE ONLY, UPON THE RETURN OF THE VERDICT IT IS ORDERED, ADJUDGED, AND DECREED THAT THE PLAINTIFFS HAVE AND RECOVER NOTHING OF DEFENDANT B. DALE STANCIL AND THAT THE PLAINTIFFS' ACTION AGAINST B. DALE STANCIL BE, AND THE SAME IS DISMISSED, WITH PREJUDICE.

This the [27th] day of July, 2004.

/s/ Lacy H. Thornburg
LACY H. THORNBURG
U.S. DISTRICT COURT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION

FILED
ASHEVILLE, N.C.
2004 AUG 31 PM 12:17
U.S. DISTRICT COURT
W. DIST. OF N.C.

CIVIL NO. 1:02CV92

VINCENT F. STRAWBRIDGE, JR., and REBECCA S. STRAWBRIDGE,

Plaintiffs,

Vs.

SUGAR MOUNTAIN RESORT, INC., and B. DALE STANCIL, Individually,

Defendants.

ORDER

THIS MATTER is before the Court on Plaintiffs' timely motion for a new trial. Defendants have filed their response

I. STATEMENT OF FACTS

This case arises out of an accident on the ski slopes owned by Sugar Mountain Resort, Inc. ("Sugar Mountain"), in 1998. The accident left Plaintiff Vincent Strawbridge with serious and permanent injuries. The case was tried before the Court and a jury beginning July 13, 2004, and on July 20, 2004, the jury rendered its verdict finding that the Defendant Sugar Mountain was not negligent in causing Plaintiffs' injuries. Plaintiffs

argue they are entitled to a new trial because they were deprived of an impartial jury, the testimony of David Rosen was unbelievable as a matter of law, and the verdict was against the weight of the evidence. These contentions are addressed below.

II. DISCUSSION

A. Standard of review.

"No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial ... unless refusal to take such action appears to the court inconsistent with substantial justice." **Fed. R. Civ. Proc. 61.** Furthermore, in ruling on a Rule 59 motion for a new trial, district courts are granted broad discretion. ***See Cline v. Wal-Mart Store, Inc.*, 144 F.3d 294, 301 (4th Cir. 1998).** A district court's denial of such a motion will not be overturned unless "the verdict is against the clear weight of the evidence, or is based upon evidence which is false, or will result in a miscarriage of justice." ***Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 100 (4th Cir. 1991) (internal citation and quotation marks omitted).**

B. Juror impartiality.

The Plaintiffs allege they were deprived of the right to an impartial jury because *voir dire* was not reopened "after disclosure that [the] jurors may have had prejudices or biases which could form the basis for a peremptory challenge or challenge for cause." **Plaintiffs' Motion for New Trial, filed August 5, 2004, ¶ 1.** During *voir dire* examination, Plaintiffs' counsel asked the potential jurors:

> Do any of you have anybody, family, close family, relatives, children, who is in any way involved in the ski industry, not necessarily on the slopes themselves, but maybe providing supplies to a resort or making deliveries to a resort or going there to make repairs, that kind of thing, in any way that might be remotely connected with the ski industry?

Exhibit 1, *attached to* Plaintiffs' Brief. No juror responded, and Plaintiffs' counsel eventually indicated that he was satisfied with the panel of potential jurors. **Plaintiffs' Brief, at 1.**

During Defendants' *voir dire* examination, Defendants' counsel asked the panel, "Have any of you known someone who has been closely connected with the ski industry, either as an operator or perhaps as a volunteer ski patroller or some position of that kind?" **Exhibit 1, *supra.*** In response to that question, Juror No. 7, Mr. Nicholson, stated that his employer was a ski patroller, that they had engaged in "friendly casual conversations" about ski patrolling, and that he did not know whether his employer patrolled at Sugar Mountain. ***Id.*** Furthermore, Juror No. 5, Ms. McDonald, stated that her "best friend's son" owned a ski shop in Asheville. **Plaintiffs' Brief, at 2.** Both jurors stated that these connections to people involved in the ski industry would not affect their ability to be impartial. **Defendants' Response to Plaintiffs' Motion for New Trial, filed August 20, 2004, at 2.**

After the Defendants approved the panel of potential jurors, Plaintiffs' counsel moved to reopen his *voir dire* with respect to Jurors Nicholson and McDonald, and the Court denied the motion. Later, Plaintiffs' counsel moved that these two jurors be replaced with

alternate jurors, and the Court denied that motion as well. **Plaintiffs' Brief, *supra.***

The Supreme Court has held that a party seeking a new trial because of incorrect answers from jurors must "first demonstrate that a juror failed to answer honestly a material question on *voir dire,* and then further show that a correct response would have provided a valid basis for a challenge for cause." ***McDonough Power Equip., Inc., v. Greenwood*, 464 U.S. 548, 556 (1984).** Here, Plaintiffs fail to satisfy the first prong of this test because neither juror answered the question of Plaintiffs' counsel dishonestly. His question about potential jurors' relationships with people in the ski industry was limited to the potential jurors' "family, close family, relatives, children." **Exhibit 1, *supra.*** Defendants' counsel expanded the scope of the question beyond the family members of the potential jurors, and Mr. Nicholson and Ms. McDonald then correctly answered that they knew people – not family members – who were involved in the ski industry. Therefore, the potential jurors' answers were neither inconsistent nor dishonest. ***Cf. Jones v. Cooper*, 311 F.3d 306, 311-12 (4th Cir. 2002) (resolving ambiguities in favor of a presumption that jurors answered questions honestly).**

Alternatively, Plaintiffs fail to satisfy the second prong of the *McDonough* test because the information that the potential jurors eventually revealed would not have supported a challenge for cause. "A challenge for cause is granted only in the case of actual bias or implied bias (although a third category, inferred bias, might also be available)." ***Id.*, at 312.**[1] In other words, challenges

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[1]In *Jones*, the Fourth Circuit acknowledged that, within the *McDonough* framework, state law regarding challenges for cause may apply. ***Jones, supra.*** However, in the present case, as in *Jones*, the party requesting a new trial has cited no North Carolina law indicating that the information revealed by the jurors would support a

for cause are granted in "instances in which threats to impartiality are admitted or presumed from the relationships, pecuniary interests, or clear biases of a prospective juror." **Moore's, *Federal Practice*, § 47.20 [1] (3d ed. 2004) (footnotes and quotation marks omitted).** In a case involving relationships similar to those present here, the Fourth Circuit upheld the trial judge's decision not to dismiss two potential jurors in a medical malpractice case where one potential juror had worked in doctors' offices and had two cousins who were doctors and another potential juror was a patient of the defendant. ***Poynter v. Ratcliff*, 874 F.2d 219 (4th Cir. 1989).** The Fourth Circuit gave great weight to the fact that those potential jurors, like the ones here, had stated that they could be impartial. ***Id.*, at 221-22.** The admissions of the two potential jurors in that case, like those in the present case, did not so clearly point to bias that a court would be forced to infer bias in spite of the jurors' claims that they could be impartial. Therefore, this Court would not have granted a motion to excuse the two potential jurors at issue for cause, and Plaintiffs would fail the second prong of the *McDonough* test even if they could pass the first.

C. Testimony of David Rosen.

The Plaintiffs also argue that David Rosen's testimony was unbelievable as a matter of law and that it prejudiced the jury. Plaintiffs cite some non-binding precedent to support a court's power to exclude testimony

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challenge for cause. ***Id.*** Plaintiffs have cited precedent from the North Carolina Court of Appeals indicating that, in a somewhat similar case, a state trial court judge should have reopened *voir dire*. ***Simmons v. Parkinson*, 119 N.C. App. 424, 426, 458 S.E.2d 726, 728 (1995).** However, the possibly relevant question of North Carolina law is not when a court should reopen *voir dire*. The potentially relevant question of North Carolina law is when a litigant will prevail on a challenge for cause, and neither *Simmons* nor any other case that Plaintiffs cite, speaks to that issue.

that "defies physical laws," that is "incredible on its face," and that "no reasonable juror could believe." **Plaintiffs' Brief, at 17.** None of Rosen's testimony falls into any of those categories.

The primary thrust of Plaintiffs' argument is that Rosen's testimony is unbelievable as a matter of law because much of it conflicts with the testimony of other witnesses. However, the jurors were instructed to evaluate the credibility of all witnesses and only to accept testimony that they found believable. Juries are capable of recognizing inconsistencies and giving testimony its proper weight. Furthermore, the Court does not agree with Plaintiffs' contention that it would be "physically impossible" for Rosen to run up the ski slope as he testified he did. In short, it is the role of the jury, not the Court, to consider inconsistencies and improbabilities in testimony and to evaluate the credibility of witnesses. Rosen's testimony was not so unbelievable or improbable as to remove it from the jury.

D. Weight of the evidence.

Plaintiffs make no argument in support of the statement that the verdict is against the weight of the evidence and the Court, therefore, finds that the verdict was supported by the weight of the evidence.

III. ORDER

IT IS, THEREFORE, ORDERED that the Plaintiffs' motion for a new trial is hereby **DENIED.**

THIS the [30th] day of August, 2004.

/s/ Lacy H. Thornburg
LACY H. THORNBURG
U.S. DISTRICT COURT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
December 20, 2005

No. 04-2250
CA-02-92

VINCENT F. STRAWBRIDGE, JR.;
REBECCA S. STRAWBRIDGE

Plaintiffs – Appellants

v.

SUGAR MOUNTAIN RESORT, INCORPORATED;
B. DALE STANCIL, individually;
THE SUGAR MOUNTAIN IRREVOCABLE TRUST;
THE B. DALE STANCIL IRREVOCABLE TRUST

Defendants – Appellees

No. 04-2331
CA-02-92

VINCENT F. STRAWBRIDGE, JR.;
REBECCA S. STRAWBRIDGE

Plaintiffs – Appellees

v.

SUGAR MOUNTAIN RESORT, INCORPORATED;
B. DALE STANCIL, individually;
THE SUGAR MOUNTAIN IRREVOCABLE TRUST;
THE B. DALE STANCIL IRREVOCABLE TRUST

Defendants – Appellants

On Petition for Rehearing and Rehearing En Banc

The appellants' petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel composed of Judge Williams, Judge Michael, and Judge Dever, United States District Judge for the Eastern District of North Carolina, sitting by designation.

For the Court,

/s/ Patricia S. Connor
CLERK

FILED
MAY 19 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-1206

IN THE

Supreme Court of the United States

VINCENT F. STRAWBRIDGE, JR., *et ux.*,

Petitioners,

v.

SUGAR MOUNTAIN RESORT, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Sugar Mountain Resort, Inc. does not have a parent corporation and there is no publicly held company that owns 10% or more of its stock.

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INTRODUCTION

Petitioners have presented no compelling reason for this Court to grant their Petition for Writ of Certiorari. The Fourth Circuit reviewed the entire voir dire examination of the jury panel and held that the District Court did not abuse its discretion by refusing to reopen voir dire. (Pet. App. at 3a-8a). The Fourth Circuit also held that a new trial was not warranted because the jurors did not respond dishonestly to Petitioners' question during voir dire. (Pet. App. at 8a-9a). On the contrary, the Fourth Circuit found that Petitioners' failure to obtain the information they sought during voir dire was "attributable to their failure to state their question clearly, not the jurors' failure to answer the question honestly." (Pet. App. at 9a).

The Fourth Circuit did not hold, as contended by Petitioners, "that federal trial courts do not have to provide an opportunity to prove actual bias when a juror's partiality is questioned." (Pet. at 1). Petitioners have misstated that holding, as well as the holdings of several cases upon which they rely. The Fourth Circuit's holding is consistent with established Supreme Court precedent and does not conflict with prior Fourth Circuit decisions or the decisions of other circuits. Petitioners received a fair trial from an impartial jury. The jury's verdict should not be disturbed.

STATEMENT OF THE CASE

This action arises out of a skiing accident that occurred at Sugar Mountain Resort ("Sugar Mountain") on January 22, 1998. (JA 19-24) On his last run of the day, Plaintiff/Petitioner Vincent Strawbridge was skiing down the Sugar Slalom slope when he lost control and fell, sustaining serious personal injuries. (JA 1201, 1218-1220, 1302)

The jury trial commenced on July 12, 2004. In accordance with local practice, the District Court allowed each side ample opportunity to conduct voir dire examination of the prospective jurors. (JA 1121-1191). Prior to turning the panel over to Plaintiffs' counsel, the District Court asked several questions, including: (1) whether they had seen, read or heard anything about the case; (2) whether they knew any of the parties, witnesses or attorneys; (3) whether they had ever been employed by Sugar Mountain; (4) whether they had used the skiing facilities at Sugar Mountain; and (5) whether they had any prejudices or biases that would affect their ability "to sit in a case of this kind involving a ski incident." (JA 1123-1131)

In response, two of the prospective jurors, including Mr. Nicholson, indicated that they knew attorney Robert Riddle, co-counsel for Sugar Mountain. (JA 1128) Both indicated that knowing Mr. Riddle would not affect their ability to be fair and impartial. (*Id.*) Another juror, Mr. Baldwin, indicated that he had skied at Sugar Mountain on a few occasions, but stated it would not affect his ability to be fair and impartial. (JA 1131) Mr. Baldwin was accepted by the Plaintiffs and served on the jury. (JA 1174) None of the other prospective jurors indicated that they knew any of the parties or witnesses, had any involvement with Sugar Mountain in the past, or knew of any reason why they could not be fair and impartial. (JA 1123-1131) The District Court then turned the panel over to Plaintiffs' counsel for questioning. (JA 1131)

During his voir dire examination, Plaintiffs' counsel questioned juror Sarah Wyatt and learned that she had two grown boys. (JA 1143-1144) He asked if her boys had ever

been involved in skiing and she said they had not. (JA 1144) He then asked the following question of the entire panel:

> Do any of you – and I ask this about your [Sarah Wyatt's] boys and everybody else on the panel. Do any of you have anybody, family, close family, relatives, children, who is in any way involved in the ski industry, not necessarily on the slopes themselves, but maybe providing supplies to a resort or making deliveries to a resort or going there to make repairs, that kind of thing, in any way that might be remotely connected with the ski industry?

(JA 1144) There was no response from any of the prospective jurors, including Mr. Nicholson, whom Plaintiff had already individually questioned about other matters. (JA 1134-1135, 1144) There is no evidence that Juror Nicholson, or any of the other prospective jurors, had any "family, close family, relatives, children" who were in any way involved in the ski industry. Contrary to the statement in their Petition, Plaintiffs' counsel did not ask Mr. Nicholson or the entire panel the broader, unqualified question of whether they *knew* anyone who was somehow involved in the ski industry. (*See* Pet. at 3).

Plaintiffs' counsel did, however, ask the panel a number of other questions. (JA 1155-1169) After receiving negative responses, he exercised two peremptory challenges. (JA 1159-1169)

Juror McDonald was then called into the jury box. (JA 1169) The District Court asked Ms. McDonald whether

she had been able to hear and understand the Court's questions and she said she had. (*Id.*) The Court then asked whether any of the Court's questions would have required a response from her and she said "no." (*Id.*) During his questioning, counsel for Plaintiffs asked Ms. McDonald whether she knew of any reason why she couldn't give the parties a fair and impartial trial and she said "no." (JA 1170) After a few additional questions of Ms. McDonald, Plaintiffs' counsel announced that he was satisfied with the jury. (JA 1174)

During Defense counsel's questioning of the jury, he asked the following question of the entire panel:

> Have any of you *known* someone who has been closely connected with the ski industry, either as an operator or perhaps as a volunteer ski patroller or some position of that kind?

(Emphasis added. JA 1175) Mr. Nicholson raised his hand. (*Id.*) When Defense counsel asked him to explain, he responded: "I have none personally, but the president of Deltec Homes is also a ski patroller." (*Id.*) Mr. Nicholson had previously advised that he worked for Deltec Homes as a director of purchasing. (JA 1153) Defense counsel asked what the president's name was and Mr. Nicholson said "Mr. David Hall." (JA 1176) Defense counsel then asked: "And he does not patrol at Sugar Mountain, I take it." (*Id.*) Mr. Nicholson responded: "I'm not certain."[1] (JA 1176) Mr. Nicholson then advised that he is not a skier himself. (*Id.*) Defense counsel then asked:

1. Mr. Nicholson did not state that Mr. Hall might have been a ski patroller at Sugar Mountain. There is no evidence to support Petitioners' insinuation that he was a ski patroller at Sugar Mountain.

> In terms of Mr. Hall, that's not a subject that you have acquired any insight and knowledge, so to speak, about as a result of the nature of your association with him?

(*Id.*) Mr. Nicholson responded: "Just friendly, casual conversations. Nothing in depth." (*Id.*) In response to later questioning about a different matter, Mr. Nicholson stated that: "I think I can be fair, yes, sir." (JA 1189)

While Defense counsel (Mr. Riddle) was questioning Ms. McDonald about the fact that she knew him through a mutual friend, he asked the following question:

> And you feel that there's nothing about that relationship that would in any way interfere with your being a fair juror in this case?

(JA 1181) She responded:

> Not at all. But there is one thing, and I don't know at which point I should mention, that one of my very best friend's sons owns a ski shop here in Asheville. Sonia Fredericks' son, Craig, has Ski Country Sports, and I don't know if that is – I mean, I would like everybody to know that that's the situation with one of my best friends.

(*Id.*) Defense counsel then stated: "Sure. Ski Country Sports you're referring to, out on the north end of town [Asheville]" and Ms. McDonald responded "Right."[2] (*Id.*) Defense counsel then asked:

---

2. The ski shop is located in Asheville, North Carolina, where the trial took place. Sugar Mountain is located in Banner Elk, about 75 miles away. (JA 21).

> But, of course, that is not your personal involvement, and I assume that you could disassociate whatever feeling you had toward Craig in his business with your own role as a juror in this case?

(*Id.*) She responded "Yes." (*Id.*) Defense counsel asked several additional unrelated questions and Ms. McDonald indicated that she could listen to the evidence and decide the case based on the facts alone. (JA 1184-1185)

After Defense counsel announced that the Defendants were satisfied with the jury, Plaintiffs' counsel expressed concern about jurors McDonald and Nicholson and requested that that voir dire be reopened so that he could conduct further examination. (JA 1190-1191) In denying the request, Judge Thornburg made the following observations:

> I had questioned the jurors, all of you had questioned the jurors and asked if there was any reason at all that they could not be fair and impartial. They all assured me, they assured you, they assured the defendants that they could be. They have been thoroughly questioned by both sides, and, of course, particularly questioned to numerous details by the plaintiff, and I have given both of you free reign. I'm satisfied that had there been some bias or prejudice that would affect their verdict that it would have been uncovered, and I feel that they will give both sides a fair and impartial trial, and I thought that the questions had been lengthy and that they had been passed, and that was adequate assurance that you would both have a fair jury verdict, and so the request at the side bar was denied.

(JA 1194)

The District Court then empanelled the jury and the trial proceeded for the next six days. (JA 1195, 2087-2088) On July 20, 2004, after hearing the evidence, argument and instructions, and after deliberating for several hours, the jury returned a verdict, finding that Sugar Mountain was not negligent. (JA 2087-2088)

After the verdict, Plaintiffs filed a Motion for New Trial on several grounds, including the District Court's refusal to reopen jury selection as to Nicholson and McDonald. (JA 2090). Plaintiffs produced no evidence suggesting that jurors Nicholson or McDonald were biased against them during deliberations. Plaintiffs did not ask for a post-trial hearing to determine whether these jurors were actually biased. The District Court denied the motion for new trial. (Pet. App. at 14a-19a).

On appeal, Plaintiffs argued that the District Court erred in refusing to reopen voir dire and erred in denying their motion for new trial. (Pet. App. at 7a-9a). Plaintiffs again failed to ask the Fourth Circuit to remand the case for a hearing to determine juror bias. The Fourth Circuit rejected Petitioner's arguments and affirmed the District Court. (*Id.*)

REASONS FOR DENYING THE PETITION

I. The Fourth Circuit correctly determined that the District Court did not err in refusing to reopen voir dire.

A. The Fourth Circuit correctly deferred to the District Court's determination that the voir dire was adequate.

The Fourth Circuit did not hold, as contended by the Petitioners, "that federal trial courts do not have to provide an opportunity to prove actual bias when a juror's partiality is questioned." (Pet. at 1). On the contrary, the Fourth Circuit simply held that the District Court did not abuse its discretion in refusing to reopen voir dire examination. In so holding, the Fourth Circuit applied the correct standard of law to the facts of this case.

This Court has stated that "[b]ecause the obligation to impanel an impartial jury lies in the first instance with the trial judge, and because he must rely largely on his immediate perceptions, federal judges have been accorded ample discretion in determining how best to conduct the voir dire." *Rosales-Lopez v. United States*, 451 U.S. 182, 189 (1981); *See also Mu'Min v. Virginia*, 500 U.S. 415 (1991). In particular, "[w]hether to reopen voir dire and what questions to permit is largely within the discretion of the district court." *U.S. v. Adams*, 305 F.3d 30, 35 (1st Cir. 2002); *See also Andrews v. Scott*, 21 F.3d 612 (5th Cir. 1994); *Soria v. Johnson*, 207 F.3d 232 (5th Cir. 2000); *Sallahdin v. Gibson*, 275 F.3d 1211 (10th Cir. 2002).

B. The Fourth Circuit correctly determined that the District Court had a sufficient basis to refuse to reopen voir dire.

The Fourth Circuit found "ample grounds for deferring" to the District Court's determination that "the voir dire was adequate on matters of potential bias." (Pet. App. at 7a). As noted by the Fourth Circuit, the District Court asked the jurors a number of questions to determine whether they could be fair and impartial. (JA 1128-1131, 1169-1170). All of the jurors acknowledged they could, including jurors Nicholson and McDonald. *Id.* Under questioning by Plaintiffs' counsel, Nicholson and McDonald acknowledged they could give the parties a fair trial. (JA 1134-1174) Under questioning by Defense counsel, jurors Nicholson and McDonald again acknowledged they could be fair. (JA 1181, 1189).

Although Nicholson indicated that the president of his company was a ski patroller at an unknown resort, he said they had only had "friendly, casual conversations" about it. (JA 1176). Although McDonald indicated her best friend's son owned a ski shop in Asheville, she said she could disassociate her feelings about him from the case. (JA 1181-1185, 1189) Neither juror was employed by Sugar Mountain, nor had any family members who were employed by Sugar Mountain. (JA 1123-1131, 1169) In fact, neither juror had ever skied at Sugar Mountain. (JA 1172-1173, 1176) It is highly unlikely the court could impanel a Western North Carolina jury without someone having at least a remote connection with the ski industry. Regardless, a remote connection with the ski industry is not itself evidence of potential bias in favor of Sugar Mountain.

Based on the responses by all the jurors, including Nicholson and McDonald, and based on their demeanor and credibility, the District Court determined that "had there been some bias or prejudice that would affect their verdict, it would have been uncovered." (JA 1194) The District Court Judge was in the best position to make this determination and Petitioners have offered only speculation to rebut it. Petitioners have offered no evidence, by affidavit or otherwise, which shows that either Nicholson or McDonald was at all biased against the Plaintiffs during jury deliberations. In the absence of any evidence that these jurors' tenuous relationship to the ski industry had any effect on the proceedings, the request to reopen voir dire was properly denied by the District Court. *See Andrews*, 21 F.3d at 621; *Soria*, 207 F.3d at 240-241. As such, the Fourth Circuit correctly determined that the District Court did not abuse its discretion in denying Plaintiffs' request to reopen voir dire.

II. The Fourth Circuit decision is consistent with established Supreme Court precedent dealing with voir dire examination.

A. The proper standard of review is set forth in *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548 (1984).

The Fourth Circuit correctly relied on the principles set forth in *McDonough v. Greenwood* in holding that a new trial was not warranted in this case. Under *McDonough*, this Court held that to obtain a new trial, "a party must first demonstrate that a juror failed to answer honestly a material question on voir dire and then further show that a correct response would have provided a valid basis for a challenge for cause." *McDonough*, 464 U.S. at 556. Applying *McDonough*, the Fourth Circuit correctly concluded that Petitioners failed to demonstrate that the jurors failed to answer honestly a question by Petitioner's counsel. (Pet. App. at 8a).

The Fourth Circuit agreed with the District Court that the question posed by Petitioners' counsel was logically interpreted by the jurors to be limited to their family ties to the ski industry, as opposed to the broader question of whether they knew anyone connected with the industry. (*Id.*) The Fourth Circuit noted that the Petitioners' "inability to obtain the information they sought during voir dire is attributable to their failure to state their question clearly, not the jurors' failure to answer the question honestly." (Pet. App. at 9a). On that basis, the Fourth Circuit correctly affirmed the District Court's denial of Petitioners' Motion for New Trial.

B. The Fourth Circuit decision is distinguishable from, but consistent with, *Remmer v. U.S.*, 347 U.S. 227 (1954) and *Smith v. Phillips*, 455 U.S. 209 (1982).

Having lost the issue twice in the lower courts, Petitioners have abandoned their once heavy reliance on *McDonough* and now seek to rest their case on *Remmer v. U.S*, 347 US. 227 (1954) and *Smith v. Phillips*, 455 U.S. 209 (1982), arguing that the Fourth Circuit decision "undermines" these cases. In fact, *Remmer* and *Smith* are clearly distinguishable from the present case.

Remmer and *Smith* stand for the proposition that if there are allegations of serious juror impartiality or misconduct, then a defendant in a *criminal case* may be entitled to a post trial hearing to determine whether the juror was actually biased against him. *See Smith*, 455 U.S. at 215; *Remmer*, 347 U.S. at 229-230.

In *Remmer*, after the jury returned a verdict, the defendant taxpayer learned that the foreman of the jury had been

approached about a possible bribe by an unknown person. *Remmer*, 347 U.S. at 228. The Court remanded the case to the District Court to conduct a hearing to determine whether the incident "was harmful to the petitioners, and if after hearing it is found to have been harmful, to grant a new trial." *Id.* at 230.

In *Smith*, after the defendant's conviction of murder, he learned that one of the jurors had applied for a job as a major felony investigator in the district attorney's office during the trial. *Smith v. Phillips*, 455 U.S. 209, 212 (1982). Upon motion of the defendant, the district court conducted a hearing at which the juror explained his actions and the court concluded that the juror was not biased against the defendant. *Id* at 213. The Supreme Court held that the defendant's rights had been protected by the hearing and that he was not entitled to a new trial. *Id.* at 217.

Petitioners in the present case have failed to show any evidence of juror impartiality or misconduct on the part of jurors Nicholson or McDonald of the type involved in *Smith* and *Remmer*. Moreover, Petitioners have never asked for a post trial hearing to determine whether these jurors were actually biased against them, thereby waiving any right to seek one now. "[W]hen a party fails to raise a theory at the district court level, that theory is generally regarded as forfeited and cannot be advanced on appeal." *U.S. v. Torres*, 162 F.3d 6, 9 (1st Cir. 1998). Thus, the Fourth Circuit decision is distinguishable from, but consistent with, *Smith* and *Remmer*.

III. The Fourth Circuit decision is consistent with Fourth Circuit precedent and does not create a split between the Circuits.

A. The Fourth Circuit recently held that the trial court was not obligated to conduct an evidentiary hearing about matters that were fairly discoverable during voir dire.

In the recent case of *Billings v. Polk*, 441 F.3d 238 (4th Cir. 2006), the Fourth Circuit squarely addressed the issue argued by Petitioners in the present case – whether the District Court erred in failing to conduct an evidentiary hearing to prove actual bias. In *Billings*, the defendant appealed his conviction on the grounds that one of the jurors allegedly failed to answer honestly certain questions in *voir dire* and failed to disclose certain information regarding her feelings about defense counsel. *Id.* at 244. After concluding that the juror did not answer a material question dishonestly under the *McDonough* test, the Court considered whether the trial court erred in not holding an evidentiary hearing to determine whether the juror was actually biased. *Id.* at 245. Noting that it was not clear whether defendant asked for an evidentiary hearing, the Court held that even if he did, the trial court was not required to hold a hearing because the defendant "had ample opportunity at *voir dire* to discover" the information sought from the juror. *Id.*

The Court stated that *Smith v. Phillips*, *supra*, does not require a court "to hold an evidentiary hearing any time that a defendant alleges juror bias, regardless of whether he utilized the pre-trial procedures available for ensuring the jury's impartiality." *Id.* at 246-267. The Court cautioned that

> [o]therwise, defendants would be able to sandbag the courts by accepting jurors onto the panel without

> exploring on *voir dire* their possible sources of bias and then, if their gambit failed and they were convicted, challenging their convictions by means of post-trial evidentiary hearings based on newly discovered evidence of possible juror bias.

Id. Therefore, the Court held that the trial court was not obligated "to hold a post-trial evidentiary hearing about matters that were fairly discoverable on *voir dire.*" *Id.*

In the present case, Petitioners had an unfettered opportunity to conduct voir dire examination of the prospective jurors about any matter they deemed relevant. Petitioners' failure to discover information about jurors Nicholson and McDonald during their questioning did not entitle them to reopen voir dire after they had passed the jury. It certainly did not entitle them to a post-trial evidentiary hearing to determine juror bias. As noted by the Fourth Circuit, "a trial court has broad discretion to determine whether to order a hearing on a claim of juror bias." (Pet App., at 9a). As such, the Fourth Circuit correctly determined that the District Court did not abuse its discretion in declining to hold a hearing or permit further questioning on the issue of actual bias.

B. The Fourth Circuit decision is distinguishable from, but consistent with, *United States v. Rucker*, 557 F.2d 1046 (4th Cir. 1977).

Petitioners' reliance on *United States v. Rucker* is misplaced. In *Rucker*, the voir dire consisted only of written questions to the jury. Two of the jurors failed to answer specific questions regarding their physical and mental capacity to serve. The Court held that when the trial court

has "reason to believe from information supplied by the veniremen themselves that one of them may well have lacked, and one did lack, physical or mental capacity to serve as jurors, the defendant's request for a specific inquiry was reasonable and should have been granted." *Rucker*, 557 F.2d at 1049.

Unlike *Rucker*, the District Court in the present case allowed both parties to ask extensive voir dire questions and also asked a number of questions itself. Based on all the answers given, the District Court found no indication of bias. Unlike the jurors in *Rucker*, there was no "ambiguity" about the fitness of Nicholson or McDonald to sit on the jury. They were both competent to serve and gave no indication that they were biased against Petitioners. Thus, the Fourth Circuit correctly determined that the trial court did not err in refusing to reopen voir dire.

C. The Fourth Circuit decision does not create a split between the Circuits.

None of the cases cited by Petitioners create a conflict with the Fourth Circuit's decision in the present case. In *Caterpillar v. Sturman Industries, Inc.*, 387 F.3d 1358, 1371 (Fed Cir. 2004), the Court held that a juror who was married to a Caterpillar employee was impliedly biased as a matter of law and should have been dismissed for cause. *Caterpillar* has no relevance to the present case because Petitioners have not argued that jurors Nicholson or McDonald were impliedly biased.

U.S. v. Torres, 128 F.3d 38 (2nd Cir. 1997) is equally inapplicable. In *Torres*, the Court held that the trial judge did not abuse its discretion in dismissing several jurors for cause based on implied and inferred bias. Petitioners have not argued that the District Court erred in dismissing any of the jurors for cause.

U.S. v. Gillis, 942 F.2d 702 (10th Cir. 1991) and *Fietzer v. Ford Motor Company*, 622 F.2d 281 (7th Cir. 1980) were criminal cases in which the trial court conducted the voir dire and did not permit the parties to ask any questions. In *Gillis*, the jury panel included people who had served as jurors for an earlier case in which the defendant was tried for a similar crime. The Court held that the trial court's failure to ask the jurors about possible bias related to serving on the prior panel was reversible error. In *Fietzer*, a products liability case involving a Ford Comet, the Court held that the trial court committed reversible error in failing to inquire about whether the jurors had been involved in similar car accidents, owned a Ford Comet, or had seen any pre-trial publicity. *Fietzer*, 622 F.2d at 286.

In the present case, the District Court allowed both sides to conduct voir dire about any matter they deemed relevant. After satisfying themselves, Petitioners passed the panel to Defense counsel. The fact that some new information came to light during Defense counsel's questioning did not compel the District Court to reopen voir dire. The new information – that juror Nicholson worked with a person who was a ski patroller at an unknown resort and that juror McDonald's best friend's son owned a ski shop – was not the type of information that required additional inquiry. Both jurors had already denied any prejudices that would affect their ability to sit on a jury involving a ski accident. Both jurors had repeatedly stated that they could be fair and impartial. Based on the entire voir dire examination, the District Court did not abuse its discretion in denying additional questioning. Thus, the Fourth Circuit's opinion upholding that decision does not conflict with any of the cases cited by Petitioners from other jurisdictions.

CONCLUSION

For these reasons, the petition for certiorari should be denied.

Respectfully submitted,

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